IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 270 OF 2004

Babu Bacharam Chikhalwale & ors. ... Appellants

V/s

Rangrao Bapu Chikhalwale & anr. ... Respondents

Mr. G.M. Savagave for the appellants.

Mr. A.B. Borkar for the respondent Nos. 1 & 2.

CORAM: P.V. KAKADE, J.

DATED: 19TH SEPT., 2005

P.C.:

1. The appellants have preferred this appeal against the judgment and order passed by the Addl. District Judge, Kolhapur, dated 20.12.2003 allowing the appeal and setting aside the order passed by the Civil Judge, J.D., Kolhapur in R.C.S. No. 792 of 1999 decreeing the suit.

2. I have heard the learned counsel for both parties. Perused the record.

3. The plaintiffs filed the suit for declaration of their joint ownership to the extent of 1/2 share as well as perpetual and mandatory injunction against the defendants. They have sought declaration that the suit property is the ancestral property and they have 1/2 share in the same. Further they have sought to restrain the defendants perpetually from causing obstruction in the enjoyment of the suit property. They have also sought to demolish the construction made by the defendants in the suit property.

The defendants stoutly contested the claim on various grounds inter-alia submitting that there were previous partitions. The suit property is owned by them in exclusion to the plaintiffs as they fell to the share of their ancestor. It was never been enjoyed as way in the manner averred by the plaintiffs because the plaintiffs had alternative way to ingress to their property and egress from their property. Thus, the plaintiffs have no title and interest in the suit property and, as such, the suit was sought to be dismissed.

4. The Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiffs had proved that they had 1/2 common share and enjoyment in

the suit property and defendants had made construction in the suit property pending the suit and, as such, the obstructions against the plaintiffs were proved and suit came to be decreed.

5. Appeal was carried to the District Court at Kolhapur. The learned Addl. District Judge, after hearing both parties allowed the appeal and dismissed the suit. Hence the present appeal.

6. At the outset, it may be noted that there is no substantial question of law involved in the appeal. All the issues involved in the dispute are factual issues and are seen to be adjudicated by the lower appellate Court in proper perspective and, therefore, it would brook no interference.

It is to be noted that partitions amongst the ancestors of both parties is an admitted position and once it is an admitted position, the question of seeking declaration that the property is ancestral property and the plaintiffs have 1/2 share therein does not arise and no presumption in law can be relied upon in view of the admitted position of earlier partitions.

The lower appellate Court has, on the basis of evidence, concluded that the plaintiffs failed to prove that the suit property was kept common between the branches of the plaintiffs and defendants in joint family partition and therefore they were not entitled to reliefs as sought for. The map of City Survey Nos. 729 to 734 is produced on record at Exh.45 which shows that Survey No.729 to 734 are adjacent to each other and city survey numbers are ascending from east to west. City Survey Nos. 731 and 732 are to the eastern side of the suit property and the property of the defendants is situated at the western side of the suit property and, therefore, it is to be noted that there are roads to south side and north side of this property. Moreover, there is an open space in front of City Survey Nos. 729, 730 and 732 towards their north side. Therefore, it is not difficult to approach the road which is to the north side of their property. It is further to be noted that City Survey No. 731 is situated to south side of City Survey No. 732 and it is an open space and under such circumstances, the learned lower appellate Court Judge came to the conclusion that there was no difficulty for the plaintiffs to approach the road to the north side of their house.

In view of this factual matrix, I am satisfied that the lower appellate Court has rightly appreciated the evidence and, therefore, it would brook no interference.

In the result, for want of substantial question of law, the appeal stands dismissed with no order as to costs.

Consequently, Civil Application No. 274 of 2004 also stands dismissed with no order as to costs.

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